orig.

STATE OF MICHIGAN
IN THE SUPREME COURT

JUSTINE MALDONADO,

Plaintiff-Appellee,

-vs-

FORD MOTOR COMPANY,

Defendant-Appellant.

Supreme Court Case No. _____

Court of Appeals Case No. 243763 ap 4/22/04

Wayne County Circuit Court
Case No. 00-018619-NO

and Daniel P. Bennett, Defendant. W. Gionan

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DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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JUDGMENT AND ORDERS APPEALED FROM AND RELIEF SOUGHT

Defendant-Appellant Ford Motor Company applies to this Court for leave to appeal from the unpublished per curiam opinion of the Court of Appeals issued April 22, 2004 (Appendix, Tab A), reversing the Wayne County Circuit Court's August 21, 2002 Order Granting Dismissal With Prejudice (Appendix, Tab B) and September 5, 2002 Order Excluding The Testimony of "Propensity" Witnesses (Appendix, Tab C).

This Court has jurisdiction over this application for leave, filed within 42 days of the Court of Appeals' filing of the April 22, 2004 opinion that is the subject of this application, pursuant to MCR 7.301(A)(2) and MCR 7.302 (C)(2)(b) and (C)(4)(a).

For the reasons stated in the application, Defendant-Appellant submits that this Court should grant this application and reinstate the Wayne County Circuit Court's August 21, 2002 Order Granting Dismissal With Prejudice and September 5, 2002 Order Excluding the Testimony of "Propensity" Witnesses, thus reversing the Court of Appeals on these two issues.[1]

[1] Simultaneously with the filing of this application, Ford is filing an application in another action, Milissa McClements v Ford Motor Company, et al, involving many overlapping facts and related legal theories. Accordingly, Ford requests that this Court consider consolidating these cases if leave to appeal is granted.

QUESTIONS PRESENTED

I. Whether a trial court's has the inherent authority and duty to the integrity of the judicial system to dismiss a complaint where the court has made the findings after an evidentiary hearing that a party and counsel have engaged in egregious and flagrant misconduct intended to interfere with their opponent's fair trial rights, and have continued in the misconduct even after being warned that their complaint would be dismissed.

II. Whether the trial court has the discretion to exclude, in an individual hostile work environment case under the Elliott-Larsen Civil Rights Act, unreported, unwitnessed, and unproven allegations of third-party witnesses that the witnesses believed they were subjected to sexual harassment, especially where the allegations were unknown to Plaintiff other than through her lawsuit.

I. INTRODUCTION

This application addresses a trial court's inherent authority to impose sanctions, including dismissal, to preserve the integrity of the judicial process in that rare case in which a party and her counsel engage in intransigent, premeditated, and flagrantly abusive misconduct calculated to interfere with the fair trial rights of their opponents. The existence of this inherent authority – both to punish the wrongdoing before the court and to serve as a deterrent so that the institution is not compromised – is beyond doubt.

The Court of Appeals, however, departed from longstanding principles that are the foundation of the trial court's inherent authority, to hold that the trial court may not exercise this authority until the ultimate harm is both accomplished and proven. According to the Court of Appeals, only when the trial court has established, through an evidentiary hearing, that premeditated, wanton misconduct by a party and her counsel has actually destroyed the other side's fair trial rights can the misconduct be sanctioned.

The efficacy of the inherent authority rule, however, is measured in its ability not only to punish misconduct, but to prevent the harm that flows from such misconduct – both in the case before the trial court and in future cases in other courts. To limit the imposition of sanctions for premeditated and egregious misconduct to situations where there is a finding that actual harm already has occurred virtually extinguishes the rule. To put it most bluntly, it handcuffs trial judges from acting in situations where flagrant misconduct is obvious and palpable, and where immediate consequences are necessary and deserved.

The Court of Appeals' holding that misconduct may be punished only upon proof that fair trial rights have actually been tainted, and cannot be cured, will encourage the

very type of gross, premeditated, and relentless misconduct engaged in by Plaintiff and her counsel here, who mocked the trial court and challenged it to even try to rein them in. One warning, followed by a second admonition expressly informing Plaintiff and her counsel that their lawsuit would be dismissed if the misconduct continued, just intensified and magnified their misconduct, as well as their public derision of the trial court and its rulings. After thoughtfully and dispassionately addressing what Plaintiff and her counsel had done, and were openly trying to accomplish, the trial court concluded it had no choice but to dismiss Plaintiff's complaint or abandon its inherent authority – *and duty* – to preserve the integrity of the judicial process. Based on an undisputed factual record, the trial court made the right decision. The Court of Appeals, viewing the situation from a distant appellate bench, did not. It applied technical rules and constraints that do not, and cannot, govern an extraordinary situation such as this.

This application for leave also addresses the Court of Appeals' casual expansion of important concepts of "notice" and "fault" in the context of an employer's liability for an allegedly sexually hostile work environment. Rather than adhering to bedrock evidentiary principles and burdens of proof established by this Court and the Legislature, the Court of Appeals created a new and unworkable standard for "constructive notice" that essentially imposes strict liability on an employer for unreported, unwitnessed, and otherwise unknown allegations of workplace sexual misconduct by third party witnesses whose experiences were unknown to the Plaintiff and were unconnected to her own work environment. The trial court properly precluded this proffered third-party evidence, but the Court of Appeals reversed and ruled it admissible.

Both of these issues are of major significance to the jurisprudence of our State, and warrant this Court's review. The first goes to the heart of the judicial process and its integrity – the second to the basic rules by which employment and other issues are tried. This application should accordingly be granted and the Court of Appeals' decision reversed, or this Court should peremptorily reverse in lieu of granting leave pursuant to MCR 7.302(G)(1).

II. STATEMENT OF THE CASE

A. Factual Background.

The claim brought by Plaintiff-Appellee Justine Maldonado ("Plaintiff") was a straightforward hostile work environment claim under the Elliott-Larsen Civil Rights Act, MCL 37.2101 et seq., against Defendant-Appellant Ford Motor Company and Defendant Daniel P. Bennett ("Ford" and "Mr. Bennett" respectively, or "Defendants" collectively). Plaintiff's allegations concerned her employment as an hourly worker at the Ford's Wixom Assembly Plant, where Mr. Bennett had been a Production Superintendent. The trial court did not address the merits of Plaintiff's claim, nor are those merits an issue in this application. What is addressed in this application are the undisputed facts concerning premeditated misconduct of Plaintiff and her counsel to tamper with the administration of justice and deny Defendants a fair trial, including their campaign to publicize inadmissible evidence right up to the July 8, 2002 trial date. A second and related subject of this application involves certain third-party witnesses whose testimony Plaintiff planned to offer at trial concerning alleged sexual misconduct purportedly directed at them – not at Plaintiff. The facts in this regard are also undisputed. The proffered third-party witness testimony is not material or relevant on

the issue of liability. It was not witnessed by Plaintiff or anyone else. It was not reported to Ford. It was not known by Plaintiff during the time she claims she was subjected to a sexually hostile work environment. Indeed, with minor exception, Plaintiff became aware of these alleged incidents only after she filed her lawsuit.

The Court of Appeals clearly erred and disregarded established precedent by reversing the trial court's rulings on both of these issues.

1. Plaintiff and Her Counsel's Premeditated Misconduct Resulting In The Order Of Dismissal.

With respect to the misconduct of Plaintiff and her counsel -- misconduct that led to the trial court's dismissal of Plaintiff's Complaint with prejudice -- the pertinent facts in chronological order are as follows:

On February 16, 2001, the Honorable Kathleen MacDonald, the trial judge originally assigned to this matter, granted Defendants' motion *in limine* precluding introduction at trial of a 1995 misdemeanor conviction for off-duty off-premises conduct involving Mr. Bennett and three strangers to Defendants.[2] The ruling *in limine* applied to this case as well as another case then pending before Judge MacDonald, Lula Elezovic v Ford Motor Company, Wayne County Circuit Court No. 99-934515-NO. Judge MacDonald denied Plaintiff's motion for reconsideration of the *in limine* ruling, and, on July 2, 2001, the Court of Appeals denied Plaintiff's application for leave to appeal the *in limine* ruling. (07/02/01 Order, COA No. 233449). Plaintiff then filed an application with this Court seeking leave to appeal the *in limine* ruling.

On August 30, 2001, following a three-week trial, and while Plaintiff's application

[2] Judge MacDonald's Order is not included on the trial court's docket sheet. A copy was provided to the Court of Appeals and is provided in the Appendix under Tab D.

for leave to appeal to this Court was pending, Judge MacDonald directed a verdict in the Elezovic case in Defendants' favor. Judge MacDonald remained steadfast in enforcing the *in limine* ruling throughout the Elezovic trial.[3] Shortly after the Elezovic trial, on September 11, 2001, Plaintiff's counsel circulated a press release announcing Plaintiff's intent to file a motion to disqualify Judge MacDonald, and providing details of the expunged conviction Judge MacDonald had ordered excluded *in limine*. The press release further provided that Plaintiff's (Ms. Maldonado's) case "will be going to trial soon." (R. 435, Exh. C, Appendix, Tab E). Predictably, a series of news broadcasts and print stories followed, replete with references to the inadmissible conviction. (07/09/02 Tr., pp. 6-7).

Upon Plaintiff's filing of her Motion to Disqualify, Judge MacDonald stayed further proceedings in the present case, including trial. Judge MacDonald denied Plaintiff's disqualification motion, and, by Order dated January 11, 2002, established a trial date of Monday, July 8, 2002. (R. 271).

In February 2002, Judge MacDonald accepted re-assignment to the Family Division, and the Wayne County Circuit Court re-assigned this case by lot to the Honorable William J. Giovan. (R. 274). Shortly after the re-assignment, in April 2002, this Court denied Plaintiff's application for leave, leaving intact Judge MacDonald's *in limine* Order excluding Mr. Bennett's conviction. (04/02/02 Order, SC No. 119753,

[3] The Court of Appeals affirmed the directed verdict and *in limine* ruling in Elezovic v Ford Motor Company, 259 Mich App 187; 673 NW2d 776 (2003), *special panel not convened*, 259 Mich App 801; 677 NW2d 378 (2003). Ms. Elezovic has an application for leave to appeal pending before this Court concerning her case.

Appendix, Tab F).[4]

In preparation for the July 8, 2002 trial, Defendants filed another motion *in limine*, this one to exclude the "propensity" testimony of alleged sexually inappropriate conduct by Mr. Bennett toward women other than Plaintiff, who were being identified as third-party witnesses. (R. 306). Plaintiff's counsel invited the media to the May 17, 2002 hearing regarding this evidence, with full knowledge that the evidence could well be ruled inadmissible. When Judge Giovan ordered that hearing closed to the media, in light of the potentially inadmissible evidence that would be addressed, Plaintiff's counsel asked the press to wait out in the hallway so that counsel could communicate to the media the details covered in the hearing. During the same hearing, Plaintiff's counsel announced an intention to file a motion seeking dissolution of the existing *in limine* order regarding Mr. Bennett's conviction. (05/17/02 Tr., pp. 51-54). At the close of the May 17 hearing, Judge Giovan took Defendants' motion *in limine* regarding the "propensity" testimony under advisement. (05/17/02) Tr., p. 40).

Immediately following the May 17 hearing, Judge Giovan met with the parties' attorneys in chambers to discuss Plaintiff's counsel's persistent references to Mr. Bennett's expunged conviction -- evidence that was the subject of an existing *in limine* order and therefore inadmissible, including Plaintiff's counsel's comments to the media still waiting outside the courtroom. Mr. Bennett's counsel's raised concerns that Plaintiff's counsel was repeatedly violating the expungement statute, which makes it a criminal offense to "divulge[], use[] or publish[] information concerning [the expunged]

[4] In the meantime, in November 2001, the district court that had presided over Mr. Bennett's 1995 trial ordered Mr. Bennett's conviction expunged pursuant to MCL 780.621, MCL 780.622.

conviction." MCL 780.623(5). Plaintiff's counsel George Washington responded that "it was worth the risk" to continue to talk about the conviction. Judge Giovan declined to order Mr. Washington to adhere to the expungement statute, saying the court considered it redundant to order an attorney to follow the law. (06/21/02 Tr., p. 34; 07/08/02 Tr., pp. 94-95). Upon leaving this conference, and despite Judge Giovan's admonition and expression of confidence that counsel would follow the law, Plaintiff's counsel met with the waiting media.

Plaintiff's counsel's invitation to and meetings with the media at the May 17 hearing predictably resulted in TV news and press coverage, including interviews with Plaintiff's counsel concerning both the potentially excluded and already excluded evidence. (07/08/02 Tr., p. 94; 07/09/02 Tr. pp. 7-8). Shortly thereafter, Plaintiff and her counsel discussed the inadmissible conviction in other fora, including a May 28 public meeting and a June 1 "By Any Means Necessary" ("BAMN") rally in Ann Arbor. (R. 416, Exh. D; Appendix, Tab G).[5]

With the July 8 trial date approaching, Plaintiff's allegations appeared on the cover of the June 12-18, 2002 Metro Times, a free weekly publication readily available in businesses throughout the Detroit area and in the Wayne County Circuit Court building, where the trial in this matter was imminent. (R. 386, Exh. C, Appendix, Tab H). Plaintiff's counsel provided the Metro Times with the bulk of the material included in the lengthy cover article, including details of the inadmissible conviction and potentially inadmissible "propensity" evidence from third-party witnesses. (Id; R. 422, Exh. A).

[5] All three attorneys representing Plaintiff in this matter (George Washington, Miranda Massie and Jodi-Marie Masley) were BAMN officials at the time. (Id).

Local TV and radio coverage, including Fox 2 News and WJR's Paul W. Smith show, covered the article's release. (R. 386, p. 4).

Following *in limine* hearings on June 13 and 21, 2002, which Judge Giovan again closed to the media because of the discussion of inadmissible and potentially inadmissible evidence, the trial court denied Plaintiff's motion to dissolve Judge MacDonald's *in limine* order regarding the inadmissible conviction, and granted Defendants' motion *in limine* to exclude the "propensity" witnesses. (06/21/02 Tr. pp. 21-26, 35-42). During the June 21 hearing, Defendants' counsel again raised concerns about Plaintiff's and her counsel's repeated public references to the inadmissible evidence, especially with the July 8 trial date so close. Specifically citing the Metro Times story, the trial court warned the parties and counsel that the publication of inadmissible evidence posed a grave threat to fair trial rights. Despite his earlier assertion of confidence in counsel's adherence to the law, Judge Giovan expressly advised that the court would dismiss Plaintiff's complaint or grant a default judgment against Defendants if the court concluded either side was attempting to interfere with the other side's right to a fair trial. (06/21/02 Tr., p. 30). Plaintiff personally attended the hearing with her counsel, and, as she later confirmed to the press, she heard and understood the warning.

Despite Judge Giovan's warning, three days later, on June 24, 2002, Plaintiff announced under oath, and with her attorney by her side, that she was and intended to continue "talking about [the inadmissible conviction] all over town" and would post it on the Internet if she could find a way to do it. (R. 386, Exh. L; Appendix, Tab I). She further testified that she did not care if her publication of this inadmissible evidence was

itself criminal activity. (Id). On June 26, two days later and with the trial less than two weeks away, Plaintiff and her counsel joined forces with BAMN, now called the "Justice for Justine Committee," to hold a press conference in front of Ford's World Headquarters in Dearborn. Leaflets detailing the inadmissible evidence, including the expunged conviction, were handed out during the press conference and to passers-by, and Plaintiff led the NBC affiliate's local news broadcast. (R. 386; Appendix, Tabs J, K). Plaintiff announced on this news broadcast that she knew the trial court would dismiss her complaint with prejudice because of what she was doing, and she did not care. She further announced that she would not curtail her activity despite the court's express warning:

> If we don't act the way [Judge Giovan] wants it, the way he sees fit, then he'll dismiss my case with prejudice. And what he doesn't know is, it doesn't bother me, because I'm not going to quit fighting against sexual harassment.

(Appendix, Tab B). More leaflets detailing the inadmissible evidence were distributed at the Wixom Plant and nearby commercial establishments in the following days. (R. 386; Appendix, Tab L).[6]

On June 28, 2002, Defendants filed a Motion to Dismiss Plaintiff's lawsuit based on the premeditated misconduct of Plaintiff and her counsel in publicizing the inadmissible evidence. (R. 386). In support of the Motion to Dismiss, Defendants cited the court's inherent authority to dismiss a case for a party's and/or counsel's

[6] The trial court never directed Plaintiff to not talk about what happened to her. All of Judge Giovan's admonitions specifically addressed the prohibition on disseminating inadmissible evidence. Plaintiff confirmed in her deposition that she knew Judge Giovan's warning concerned the inadmissible and expunged conviction of Mr. Bennett. (Appendix, Tab I).

misconduct, as well as its authority pursuant to MCR 2.502. On July 1, Plaintiff responded with an emergency motion to disqualify Judge Giovan. (R. 378). The disqualification motion was denied after a July 3 hearing, which denial was affirmed in a hearing before Deputy Presiding Judge Timothy Kenny on July 8. (R. 391, 415).

July 8, 2002, was of course the day the parties were originally scheduled to pick a jury, following hearings on the remaining pretrial motions, including Defendants' Motion to Dismiss. On July 8, the trial court held a comprehensive evidentiary hearing on the Motion to Dismiss, which continued into the following day, as Judge Giovan reviewed the full panoply of press clippings and media coverage generated by Plaintiff and her counsel, replete with repeated references to Mr. Bennett's expunged conviction -- evidence that had at all times since February 2001 been ordered inadmissible in any trial in this matter. (07/08/02 Tr., pp. 64-124; 07/09/02, pp. 2-50).[7] Judge Giovan questioned Plaintiff's counsel concerning their involvement in publicizing the inadmissible evidence and invited testimony from Plaintiff and her "Justice for Justine Committee" (most of whom were present) as to their involvement and intent with respect to the court's rulings. (07/08/02 Tr., pp. 102-124).

Plaintiff's counsel was flippant in responding to the court, making comments like "have I or have I ever been a member of the Communist Party, is that what this is?" (07/08/02 Tr., p. 114). Similarly, with respect to the court's questions to Plaintiff and the BAMN representatives sitting in the courtroom, Plaintiff's counsel trivialized the court's inquiry, turning to ask the group, "Who did you guys vote for in the last judicial

[7] The transcripts of the July 8 and 9, 2002 hearing are contained in the Appendix, Tabs M and N, respectively.

elections?" (07/08/02 Tr., p. 117). According to Plaintiff's counsel, Defendant's Motion to Dismiss was itself nothing more than "tripe." (07/08/02 Tr., p. 102). Plaintiff's counsel was also untruthful, denying that a September 11, 2001 press release from that law firm was issued on the eve of the originally anticipated trial, despite counsel's own words in the press release stating it was. (07/08/02 Tr., p. 120; Appendix, Tab E). At the conclusion of the two-day evidentiary hearing, Plaintiff requested permission to file a supplemental brief, which Judge Giovan granted. (07/09/02 Tr., p. 47).

By Opinion and Order dated August 21, 2002, the trial court dismissed Plaintiff's complaint with prejudice, rendering factual findings that Plaintiff and her counsel had engaged in premeditated misconduct designed to tamper with the administration of justice, and that Plaintiff and her counsel had clearly indicated that sanctions less drastic than dismissal would not deter them from their premeditated misconduct. (Appendix, Tab B).

2. The "Propensity" Testimony.

While Ford cannot predict exactly what Plaintiff will say about her proffered "propensity" testimony from third-party witnesses, we can be certain that Plaintiff's description will be filled with misrepresentation and gross exaggeration. That has been Plaintiff's *modus operandi* throughout this litigation.

There is no factual basis for the tale Plaintiff's counsel has told thus far regarding these witnesses. It is all unsupported (and untrue) argument of counsel. However, because this type of inflammatory argument by counsel convinced the Court of Appeals that this testimony was admissible to prove "notice" to Ford that Plaintiff was being subjected to a sexually hostile work environment, the factual record concerning these

witnesses deserves careful scrutiny and will be fully summarized here.[8]

Plaintiff argued to the Court of Appeals that there were nine "victims" of Mr. Bennett, the three strangers who were involved in Mr. Bennett's subsequently expunged 1995 misdemeanor conviction for off-premises, off-duty conduct, and six Ford employees. Of the six Ford employees identified by Plaintiff, one of them, i.e., Milissa McClements, has never been a Ford employee.[9] The remaining five are Plaintiff herself; Lula Elezovic; Shannon Vaubel; Pamela Perez; and Jennifer Cochran. Not one of these witnesses can provide evidence of "notice" to Ford that Plaintiff was being subjected to a sexually hostile work environment. In fact, not one of them even worked in Plaintiff's work environment. Rather, each worked elsewhere among the 3,500 employees and countless departments at the mammoth Wixom Assembly Plant while Plaintiff was employed there.

According to Plaintiff's testimony, Mr. Bennett engaged in sporadic sexually inappropriate conduct towards Plaintiff beginning in approximately February 1998 and ending no later than June 1999. (R. 307, Exhibit E; Appendix, Tab O). Accepting Plaintiff's testimony as true, Plaintiff was the very first of the alleged "victims" to provide

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[8] The trial court excluded this witness testimony under MRE 404. While Plaintiff argued that the witness testimony was admissible as part of a "common scheme or plan" to prove Mr. Bennett harassed Plaintiff, MRE 404(b), the Court of Appeals did not reach this issue. Facts concerning the overwhelming dissimilarities among the alleged events are therefore not included, other than to say that the alleged events have virtually no commonality other than targeting same alleged actor, i.e., Mr. Bennett.

[9] Ms. McClements was employed by a Ford contractor. She filed her own lawsuit, represented by Plaintiff's counsel here, alleging a sexually hostile work environment under Elliott-Larsen, as well as negligent retention. Ms. McClements' claims are the subject of another application for leave to this Court by Ford, filed concurrently with this application.

"notice" to Ford.[10] It is uncontroverted below (other than through unsupported and untrue implications by Plaintiff's counsel) that not one of the other Ford employees or Ms. McClements reported any alleged impropriety until long after Plaintiff's allegedly hostile environment ceased in June 1999.

With respect to Ms. Elezovic, there were admittedly no witnesses to any alleged misconduct affecting her. It is established that Ms. Elezovic did not complain or otherwise give notice to Ford as a matter of law until Ms. Elezovic filed her own lawsuit in November 1999, i.e., several months after Plaintiff's contact with Mr. Bennett ended. Elezovic v Ford Motor Co, 259 Mich App at 193-197.

Ms. Perez, like Ms. Elezovic, brought her own lawsuit. She alleged Mr. Bennett engaged in a single episode of misconduct in his office at the Wixom Plant. There were no witnesses. Neither Plaintiff nor Ford learned of this purported incident until June 2001, two years after Plaintiff's own contact with Mr. Bennett ended and a year after Plaintiff filed her lawsuit.[11] (R. 307).

Ms. McClements, who is employed by the food service company that runs the

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[10] According to Plaintiff, in late October 1998 while she was on a medical leave, she told an uncle, Joe Howard, about Mr. Bennett one evening when the uncle stopped by Plaintiff's apartment to use her bathroom. Mr. Howard, who actually disputes having talked to Plaintiff about Mr. Bennett until October 1999, was at the time Mr. Bennett's peer. Shortly thereafter, while still on medical leave, Plaintiff stopped by the Wixom Plant to drop off some paperwork. While there, she ran into a friend outside the Labor Relations office. This friend was a former supervisor who was handling overflow clerical work while awaiting the results of a third-party medical exam in anticipation of a disability retirement buy-out. Plaintiff claims she asked this friend, Dave Ferris, to talk to Mr. Bennett. Plaintiff admitted, however, she did not consider herself to be reporting sexual harassment, because she knew Ford's process for reporting such conduct and consciously decided not to use that process.

[11] Ford placed Mr. Bennett on administrative leave when Plaintiff filed suit in June 2000. Mr. Bennett has never returned to work.

cafeterias at Ford Wixom, also filed her own lawsuit. She claimed Mr. Bennett kissed her against her will in a cafeteria storeroom. There were no witnesses. Like Ms. Perez, neither Plaintiff nor Ford learned about Ms. McClements' allegations until June 2001, long after Plaintiff's contact with Mr. Bennett had ended.[12] (R. 307).

Ms. Cochran claims Mr. Bennett once handed her some cash while she was working on a Wixom assembly line, and remarked about getting a hotel room. She thought he was joking, handed the money back, and they both laughed. There were no witnesses. Ms. Cochran did not bring suit and does not intend to. Neither Plaintiff nor Ford knew anything about Ms. Cochran's alleged exchange with Mr. Bennett until June 2001, again well after Plaintiff's own contact with Mr. Bennett ended. (R. 307).

Finally, with respect to Ms. Vaubel, there is a single alleged incident of misconduct, a purported attempted kiss. There were no witnesses. The first time Ford heard of this allegation was in Ms. Vaubel's February 2000 deposition in the Elezovic matter. As of the time Plaintiff filed suit in June 2000, she had never met nor talked with Ms. Vaubel, and heard about Ms. Vaubel's allegation only through her lawsuit. (R. 307).

This third-party witness testimony, even if true and if admitted, cannot infer, let alone establish, "notice" to Ford that Plaintiff was being subjected to a sexually hostile work environment in February 1998 to June 1999. None of these events were witnessed by others and none of these witnesses reported their allegations to Ford before Plaintiff's contact with Mr. Bennett undisputedly ended. Most of them never reported their allegations at all, other than through litigation brought long after the fact.

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[12] Ms. Perez, like Ms. McClements, is represented by George B. Washington, Plaintiff's counsel.

Plaintiff engaged in obfuscation and outright misrepresentation by suggesting to the Court of Appeals, as well as to the trial court, that, beginning as early as August 1995, these "six" employees began reporting to Ford alleged sexual misconduct by Mr. Bennett. The obvious (and false) implication was that Ford had notice and failed to act prior to February 1998, when Plaintiff alleged Mr. Bennett first engaged in misconduct toward her. The trial court saw through Plaintiff's obfuscation, and so should this Court, but the Court of Appeals was taken by it. As Plaintiff's counsel was forced to admit to the trial court, not one of these "six employees" gave notice prior to alleged incidents involving Mr. Bennett that are the basis of Plaintiff's claim:

> THE COURT: They [Lula Elezovic, Shannon Vaubel, Milissa McClements, Pamela Perez, Jennifer Cochran] all claim to have given notice to Ford before your client was affected?
>
> MR. WASHINGTON: Well, Ms. Elezovic, I think it's undisputed, gave notice to Ford before Ms. -- they complained together, in fact, she and Ms. Maldonado. With regard to the timing of notice, we took a deposition of Mr. Gross, who is Ford's director of North American Equal Employment Opportunity, on June 29th.
>
> THE COURT: Well, I want to get it straight. [Ms. Elezovic] is or is not the only one who claims that she gave notice to Ford about Mr. Bennett prior to Ms. Maldonado being approached.
>
> MR. WASHINGTON: Well, she gave notice at the same time that Ms. Maldonado was giving notice. Ms. Vaubel gave notice before Ms. Maldonado filed suit. The other women -- Ford conducted what they said was an investigation. As of June 29, 2001, Mr. Richard Gross, the Ford North American Director for Equal Opportunity, said he had to decide whether Mr. Bennett would be disciplined. He was the guy who had to prove it. He said he hadn't made up his mind. As of that time, he had information from every one of these women that it had occurred.

> THE COURT: Okay. I'm gathering from this long answer to my questions that Elezovic is the only one who contends that she gave notice to Ford about Mr. Bennett before the alleged assaults on the Plaintiff?
>
> MR. WASHINGTON: Actually, it was *after[.]*

(05/17/02 Tr., pp. 21-22) (emphasis added). Unfortunately, the Court of Appeals did not look beyond the arguments of counsel to the record itself, before holding that these third-party witnesses should be allowed to testify to their own unreported allegations of misconduct as evidence of "notice" to Ford.

B. Proceedings In The Court Of Appeals.

In her appeal from Judge Giovan's rulings, Plaintiff raised four issues: (1) the dismissal of Plaintiff's complaint with prejudice due to Plaintiff's and her counsel's misconduct; (2) the *in limine* order excluding the third-party witnesses' "propensity" testimony; (3) the *in limine* order excluding Mr. Bennett's conviction; and (4) Judge Giovan's refusal to disqualify himself. In a *per curium* opinion endorsed by Presiding Judge Borrello and Judge Smolenski, and a separate opinion by Judge White, the Court of Appeals panel reversed the trial court on the dismissal and the order *in limine* excluding the "propensity" testimony and affirmed the trial court on the remaining issues.

With respect to the dismissal issue, the panel held that there indeed had been misconduct by Plaintiff and her counsel and that the trial court had inherent authority to impose sanctions, including dismissal, where a party and/or her counsel have engaged in such misconduct. However, the majority held that the trial court needed proof that the misconduct had actually tainted the jury pool before it could dismiss the case, and accordingly remanded the case for a "full evidentiary hearing" to determine (presumably

in 2004) whether the jury venire in July 2002 had actually been tainted by Plaintiff's and her counsel's misconduct. The majority also inexplicably ignored Judge Giovan's finding that no lesser sanction would deter Plaintiff or her counsel, holding that the trial court had somehow failed to consider the efficacy of lesser sanctions. Finally, the majority stated in a footnote that the trial court's warning to Plaintiff and her counsel to cease their misconduct had been "unconstitutionally vague," disregarding the fact that Plaintiff publicly admitted (e.g., in news broadcasts) that she had been warned by the court, that she knew she was engaging in misconduct prohibited by the court, that she was not going to stop, that she knew that the court would "dismiss [her] case with prejudice," and that this did not "bother" her. (Appendix, Tab B).

Judge White's separate opinion with respect to the dismissal emphasized the appellate judges' confusion over the inherent authority doctrine. Judge White agreed that the trial court had "authority to impose sanctions for misconduct of a party or an attorney," but opined that Plaintiff or her counsel had to first violate a court order. This is of course not a requirement under the inherent authority doctrine. Alternatively, Judge White agreed with the majority that there had to be evidence that Plaintiff's and/or her counsel's misconduct had actually tainted the jury venire, but she disagreed that an evidentiary hearing on this issue two years later was an effective recourse. Finally, Judge White criticized the trial court for not holding an evidentiary hearing "regarding the motivations of Plaintiff or Plaintiff's counsel" for engaging in their misconduct, notwithstanding Judge Giovan's explicit findings, after a two-day evidentiary hearing, on this very issue.

In short, in reversing the dismissal under the inherent authority doctrine, the three

appellate judges constructed formalistic requirements that do not exist, chastised the trial court for not holding an evidentiary hearing that had in fact occurred, and remanded for a post hoc evidentiary hearing on "actual taint" under a standard that can only be guessed at. How does a court conduct a "fuller" hearing than what Judge Giovan did? How can one prove "actual taint" in this setting better than Judge Giovan did, when he concluded that "an acceptable standard for preserving the integrity of a court system" required dismissal because:

> The behavior in question has been intentional, premeditated, and intransigent. It was designed to reach the farthest boundaries of the public consciousness. It should be presumed to have had its intended effect. (Appendix, Tab B, p. 12)

With respect to the "propensity" testimony from third-party witnesses, the majority did not address the MRE 404(b) "common plan or scheme" issue raised by Plaintiff. Instead, the panel majority held this evidence was admissible to prove Ford had "notice" that Mr. Bennett was sexually harassing Plaintiff, for purposes of establishing *respondeat superior* liability. The majority disregarded the uncontroverted facts that (1) not one of these witnesses reported alleged misconduct before or during the time Plaintiff herself allegedly experienced a hostile work environment, (2) there were no witnesses to the alleged misconduct so as to put Ford on notice of the allegations, and (3) none of these witnesses even worked with Plaintiff, so as to be part of Plaintiff's work environment. Rather, the majority shifted to Ford the burden of disproving knowledge of these alleged incidents affecting others, holding that these unreported and unwitnessed allegations were part of "the 'totality of the circumstances' known to Ford."

Judge White, writing separately, agreed with the flawed premise that unreported

and unwitnessed allegations somewhere in an enormous workplace like the Wixom Assembly Plant (then the largest manufacturing facility in North America), is somehow evidence that Plaintiff's own work environment was hostile and that Ford was on notice that Plaintiff's work environment was hostile. Indeed, Judge White also ignored the trial court's stated concerns under MRE 404 that the evidence was offered for "propensity" purposes, opining that it was wholly appropriate "to establish what exactly Ford knew about Bennett's propensities" (emphasis added).

In ruling as they did on this "propensity" testimony, the Court of Appeals ignored the uncontroverted facts and also shifted to Ford the burden of disproving fault, thereby expanding beyond recognition the concept of "notice" as set forth in this Court's decisions. Indeed, the appellate panel's analysis would dramatically alter a plaintiff's proof requirements in virtually every sexual harassment case.

III. REASONS FOR GRANTING THE APPLICATION

A. This Case Presents Important Questions Concerning A Court's Inherent Authority To Protect The Integrity Of The Judicial System Against Premeditated Misconduct.

Michigan courts, like their federal counterparts, long have recognized a trial court's inherent authority and obligation to impose sanctions, including dismissal, to protect the integrity of judicial proceedings against counsel and party misconduct. Primary among those protections warranting the exercise of the court's inherent authority is the core guarantee to all parties of a fair trial, including a minimum level of decorum. To protect this core guarantee, it must remain within the trial court's discretion to dismiss a case where the plaintiff or her counsel has engaged in premeditated attempts to undermine the judicial process by tampering with fair trial

rights.

In this case, Plaintiff and her counsel disagreed with the rulings of two trial judges that certain evidence was inadmissible and could not be presented to the jury at trial. The evidence was ruled inadmissible because it was so unduly prejudicial and of so little (if any) probative value that the admission of the evidence would deny Defendants a fair trial. Rather than abide by the trial court's orders in this regard, or follow the usual channels for preserving the issue for appeal, Plaintiff and her counsel engaged in a concerted and wide-ranging campaign to publicize the details of the inadmissible evidence via the mass media and all other available means, right up to the eve of trial, and they continued to do so even after the trial court explicitly warned them that such misconduct would result in dismissal of Plaintiff's lawsuit. While acknowledging their lawsuit could well be dismissed, Plaintiff and her counsel mocked and derided the trial court, the judicial system generally, and the very notion that they could be precluded from doing anything they wanted.

Following a two-day evidentiary hearing regarding this misconduct, the trial court dismissed Plaintiff's complaint pursuant to its inherent authority, finding that Plaintiff and her counsel had engaged in extensive misconduct in a premeditated effort to tamper with the administration of justice, and that no lesser sanction would deter Plaintiff or counsel. Indeed, Plaintiff's counsel was engaging in similar misconduct in another case against Defendants then pending in Wayne County Circuit Court before the Honorable Robert L. Ziolkowski, Perez v Ford Motor Company and Daniel P. Bennett, Case No. 01-134649-CL, although that case had not reached the trial stage.

The Court of Appeals reversed the trial court's exercise of its inherent authority.

The Court of Appeals' opinion is internally inconsistent, disregards the extensive hearing and findings by the trial court, and reflects both a misunderstanding of and reluctance to follow the inherent authority doctrine. In so doing, the Court of Appeals has given a green light to virtually any form of misconduct toward the judicial system, no matter how destructive of its ability to function, so long as no actual harm to impaneling a jury could be proven. The ability of a trial court to exercise its inherent authority to protect the integrity of the judicial process, in the rare case like this one in which a party and counsel engage in premeditated misconduct intended to prejudice fair trial rights, involves legal principles of major significance to the State's jurisprudence, and calls for this Court's intervention. This is an issue uniquely addressed to this Court's power of overseeing and controlling the judicial process.

1. The Trial Court Exercised Its Inherent Authority To Impose Sanctions, Including Dismissal.

The trial court dismissed Plaintiff's complaint based on its "'inherent authority to impose sanctions on the basis of the misconduct of a party or an attorney.'" (R. 435, p. 10) (quoting Persichini v Beaumont Hosp, 238 Mich App 626, 639-640; 607 NW2d 100 (1999)). The existence of the trial court's inherent authority to impose sanctions for litigant misconduct cannot be questioned. Indeed, the trial court has a gate-keeping obligation, when there is such misconduct, to impose sanctions that will not only deter the misconduct before it, but that will also serve as a deterrent to other litigants.

The Court of Appeals did not disagree that the trial court had this inherent authority to dismiss, nor did it disagree that Plaintiff and her counsel had engaged in repeated, blatant, and egregious misconduct in this case. (Appendix, Tab A, p. 5). Rather, the Court of Appeals took issue with the relevant legal standard, ultimately

holding that the trial court had to impose some lesser "remedy" unless it proved, through a "full" evidentiary hearing, that the premeditated misconduct had achieved its intended effect. (Id, p. 6). This is not only an erroneous legal requirement, but one can only guess at the type of hearing or proofs the appellate panel contemplates, or how the trial court failed to satisfy them in making its ruling, or how the trial court would now go about meeting these requirements.

A trial court has inherent authority to dismiss a complaint based on a party's misconduct, particularly where the conduct is purposeful and flagrant. Cummings v Wayne County, 210 Mich App 249; 533 NW2d 13 (1995). As the Court of Appeals explained in Cummings, exercise of this inherent power is most appropriate, where, as here, a plaintiff (or her counsel) has acted in blatant disregard of and out of disrespect for the judicial process:

> The authority to dismiss a lawsuit for litigant misconduct is a creature of the "clean hands doctrine" and, despite its origins, is applicable to both equitable and legal damages claims. Buchanan Home & Auto Supply Co v Firestone Tire & Rubber Co, 544 F Supp 242, 244-245 (D SC, 1981). The authority is rooted in a court's fundamental interest in protecting its own integrity and that of the judicial process. Id. See also Mas v Coca-Cola Co, 163 F2d 505, 507 (CA 4, 1947). While this Court has recognized that substantive distinctions between law and equity survived the procedural merger of law and equity, see Clarke v Brunswick Corp, 48 Mich App 667, 669; 211 NW2d 101 (1973), we do not believe that the distinction prevents a court of law from invoking the "clean hands doctrine" when litigant misconduct constitutes an abuse of the judicial process itself and not just a matter of inequity between the parties. The "clean hands doctrine" applies not only for the protection of the parties but also for the protection of the court. Buchanan Home, supra at 244. "[T]ampering with the administration of justice . . . is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot

> complacently be tolerated consistently with the good order of society." Hazel-Atlas Glass Co v Hartford-Empire Co, 322 US 238, 246; 64 S Ct 997; 88 L Ed 1250 (1944). See also Precision Instrument Mfg Co v Automotive Maintenance Machinery Co, 324 US 806, 814-815; 65 S Ct 993; 89 L Ed 1381 (1945).

Id at 252. Accord, Persichini v Beaumont Hosp, supra, 238 Mich App at 639.

As the United States Supreme Court has observed of this inherent power, in language cited with approval in Persichini, supra, 238 Mich App at 639-640 n8:

> It has long been understood that "[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution," powers "which cannot be dispensed with in a Court, because they are necessary to the exercise of all others." United States v Hudson, 7 Cranch 32, 34, 3 L Ed 259 (1812); see also Roadway Express Inc v Piper, 447 US 752, 764, 100 S Ct 2455, 2463, 65 L Ed 2d 488 (1980) (citing Hudson). For this reason, "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates." Anderson v Dunn 6 Wheat 204, 227, 5 Led 242 (1821); see also Ex parte Robinson, 19 Wall 505, 510, 22 L Ed 205 (1874). These powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." Link v Wabash R Co, 370 US 626, 630-631, 82 S Ct 1386, 1388-1389, 8 L Ed 2d 734 (1962).

Chambers v NASCO Inc, 501 US 32, 43 (1991). A dismissal pursuant to the trial court's inherent authority is imposed without regard to the merits of the underlying claim. Green v Mayor of Baltimore, 198 FRD 645, 647 (D Md, 2001).

There is abundant authority supporting a trial court's inherent power to dismiss for party or attorney misconduct, including misconduct less purposeful and less egregious than that engaged in by Plaintiff and her counsel here. See, e.g., Aptix Corp

v Quickturn Design Sys, 269 F3d 1369, 1378 (CA Fed, 2001) (court properly dismissed complaint based on its conclusion plaintiff made misrepresentations and attempted to fabricate evidence); Mitan v International Fidelity Ins Co, 23 Fed Appx 292 (CA 6, 2001) (text at 2001 WL 1216978) (where there was litigant misconduct, court did not abuse discretion in dismissing complaint and barring further complaints) (Appendix, Tab P); John's Insulation Inc v Addison & Assoc, 156 F3d 101, 108-110 (CA 1, 1998) (court did not abuse discretion in dismissing complaint and entering judgment on defendant's counterclaim where plaintiff engaged in misconduct); Bristol Petroleum Corp v Harris, 901 F2d 165, 167-168 (CA DC, 1990) (in light of plaintiff's lack of effort to comply with court's order, dismissal of plaintiff's complaint was not an abuse of discretion); Johnson v Allis Chalmers Corp, 162 Wis 2d 261; 470 NW2d 859, 863-864 (1991) (courts have both inherent and statutory authority to dismiss where plaintiff fails or refuses to obey court's orders) (Appendix, Tab Q). Indeed, "it would be an absurd anomaly to recognize a court's authority to dismiss an action for lack of progress, see MCR 2.502, or for discovery abuses, see MCR 2.313, yet leave the court impotent to control its own proceedings when they have been tainted by much more flagrant misconduct." Cummings v Wayne County, supra, 210 Mich App at 251. Dismissal is especially warranted where the plaintiff, not just her counsel, has participated in or otherwise ratified the misconduct. Bristol Petroleum, supra, 901 F2d at 167-168.

Here, the trial court found, and the Court of Appeals agreed, that Plaintiff and her counsel engaged in repeated, flagrant, and egregious misconduct in their premeditated attempts to intimidate the court and pollute the jury pool by publicizing inadmissible evidence despite the trial court's longstanding *in limine* orders and efforts to ensure the

media were excluded from those hearings pertaining to these orders. This misconduct occurred despite an explicit warning to Plaintiff and her counsel that the case would be dismissed if it continued. The Court of Appeals agreed that Plaintiff and her counsel had otherwise abused the judicial process, e.g., by moving to disqualify two trial judges because they did not give Plaintiff the rulings they wanted. Judge Giovan observed the misconduct first-hand throughout the pretrial proceedings and through a two-day evidentiary hearing on Defendants' Motion to Dismiss. Based on his findings of fact, he concluded dismissal was warranted because Plaintiff and her counsel had made it clear that no sanction short of dismissal would deter their misconduct.

In so ruling, Judge Giovan acted wholly within his authority and discretion. The question for the trial court in each case is not simply whether the sanction of dismissal is necessary to stop the misconduct in the particular case before the court, but whether it is necessary for the protection of the judicial process "to deter future violations by other parties." John's Insulation, supra, 156 F3d at 110. In this sense, the trial court exercised its gatekeeping responsibility to ensure respect for the judicial process itself, not just in the case before it but in all cases. Cummings v Wayne County, supra, 210 Mich App at 252. As the United States Supreme Court held, in less egregious circumstances, dismissal must be an option "in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." National Hockey League v Metropolitan Hockey League, 427 US 639, 643; 96 S Ct 2778; 49 L Ed2d 747 (1976). Because the action taken by the trial court here was well within its discretion under the inherent authority doctrine, the Court of Appeals erred by

imposing new standards and technical requirements never recognized by any court.

2. The Court Of Appeals Erroneously Required Proof Of "Actual Taint" For Dismissal.

Having agreed that Plaintiff and her counsel engaged in misconduct and that the trial court had the "legal authority" to dismiss Plaintiff's complaint for that misconduct (Appendix, Tab A, p. 5), the Court of Appeals nonetheless remanded the case for a fuller evidentiary hearing – thereby demonstrating the appellate judges' misunderstanding of the inherent authority doctrine. Specifically, the Court of Appeals remanded the matter to determine whether the widespread premeditated misconduct, which was intended to interfere with Defendants' fair trial rights, actually succeeded in achieving Plaintiff's and her counsel's sinister objective, i.e., did the misconduct "actually taint" the jury venire. However, the purpose of sanctions under the trial court's inherent authority is to punish and deter misconduct, in order to protect not just the parties to a particular case but also the judicial institution and the integrity of the court itself. Cummings v Wayne County, 210 Mich App at 252. The purpose is not, and has never been, to evaluate how effective the misconduct has been in actually achieving the misbehaving litigant's objectives. Nor would that be a realistic or feasible standard in any case, let alone a case in which the misconduct occurred two years earlier.

a. There Is No "Actual Taint" Requirement.

The Court of Appeals cited no authority for this "actual taint" proof requirement, nor is there any. The only cases even remotely dealing with this concept – but in a totally inapplicable context -- are those cases discussing whether *voir dire* can adequately remedy pretrial publicity. See, e.g., People v Jendrzejewski, 455 Mich 495

(1997). Those cases, however, involve pretrial publicity that arises in the natural course of events such as a celebrated criminal case. They do not address the issue that was before the trial court here, i.e., the appropriate sanction for a party and her counsel who, with premeditation, purposely infect the jury pool and disrupt the judicial process by generating as much self-serving publicity as possible concerning evidence known to the party and her counsel to be inadmissible.

Not a single inherent authority case imposes the requirement that the trial court find the jury pool has actually been tainted by litigant misconduct. To the contrary, the courts have employed a two-part test, which looks to the intent of the actor and the nature of the conduct, and balances the "harshness of the sanction . . . against the gravity of plaintiff's misconduct." Cummings v Wayne County, supra, 210 Mich App at 253. Thus, the predicate for dismissal is a finding of subjective intent and of conduct that, viewed objectively, is sufficiently egregious to pose a substantial likelihood of material prejudice. If the "reasonable inference" from the misconduct is that the litigant intended to tamper with the administration of justice, and the potential for prejudice is substantial, then dismissal is an appropriate sanction. See, e.g., Aptix Corp v Quickturn Design, supra, 269 F3d at 1374 (question is whether trial court finds evidence of "unclean hands"); Mitan v International Fidelity, supra, 23 Fed Appx at 298 (misconduct intended to abuse the legal process supports dismissal); Persichini v Beaumont Hosp, supra, 238 Mich App at 636-637 (attorney's misconduct that could have misled jury supported mistrial and imposition of costs); Carpenter v Consumers Power Co, 230 Mich App 547, 554; 584 NW2d 375 (1998) (dismissal warranted despite plaintiffs' denial of complicity in agent's misconduct where reasonable inference was that plaintiffs knew

of misconduct). There is simply no legal support or rational justification for the "actual taint" requirement imposed by the Court of Appeals.

b. The Correct Standard Was Satisfied Here.

Under the correct legal standard, the trial court properly exercised its inherent authority by dismissing Plaintiff's case. Plaintiff and her counsel engaged in premeditated misconduct, i.e., publicizing inadmissible evidence, right up to the eve of trial, despite a warning from the court to stop it. Indeed, the trial court expressly found extensive premeditated misconduct after a two-day evidentiary hearing, and the Court of Appeals agreed. In its opinion (Appendix, Tab B), the trial court reviewed the documented instances where Plaintiff and her counsel disseminated inadmissible evidence both before and after being warned. The trial court gave Plaintiff and her counsel ample opportunity to explain and even deny their actions, which they did not do. Instead, they were untruthful in their answers, mocked Defendants' Motion to Dismiss as "tripe," heckled the trial court and Defendants' counsel, and led the "BAMN/Justice for Justine" contingent in rounds of cheers, jeers, and derision, in a display appropriate to a circus, not a court of law. It plainly was Plaintiff's and her counsel's intent to tamper with the administration of justice, particularly in light of the trial court's ruling that the inadmissible evidence was so overwhelmingly prejudicial that its admission, in and of itself, would deprive Defendants of a fair trial. The Court of Appeals majority agreed.[13]

In sum, the trial court found and the Court of Appeals concurred that Plaintiff and her counsel admittedly engaged in widespread misconduct with the premeditated intent

[13] Judge White, writing separately, disagreed, characterizing Plaintiff's and her counsel's intent with respect to the jury pool as mere reckless indifference!

to infect the jury venire. The egregious and premeditated misconduct contained in these findings clearly outweighed and justified the harshness of the dismissal sanction, thus satisfying the standard for dismissal under the inherent authority doctrine. Cummings v Wayne County, supra, 210 Mich App at 253.

c. The Court of Appeals Misconceived the U.S. Supreme Court's Gentile Test.

The Court of Appeals' misunderstanding of the inherent authority doctrine is further revealed by its merging the "actual taint" standard with the "substantial likelihood of material prejudice" standard adopted by the United States Supreme Court for limitations on attorney speech in Gentile v State Bar of Nevada, 501 US 1030; 111 S Ct 2720; 115 L Ed2d 888 (1991). The Court of Appeals remanded Plaintiff's case "for a full evidentiary hearing to determine whether under the 'substantial likelihood' test in Gentile, supra, the conduct of Plaintiff and her attorneys generated pretrial publicity that contaminated the jury pool so as to deprive defendants of a fair trial." (Appendix, Tab A, p. 7). The Gentile test does not apply here.

In Gentile, the U.S. Supreme Court considered the standard that should govern a state's ability to discipline an attorney's speech concerning parties or proceedings in which the attorney is involved. 501 US at 1069-1075. Under scrutiny was an ethics rule identical in all relevant respects to Michigan Rule of Professional Conduct 3.6. Michigan Rule 3.6 is one of the rules the trial court expressly warned Plaintiff and her counsel not to violate.

The attorney who challenged the ethics rule in Gentile argued that attorneys should be subjected to the same "clear and present danger" standard for speech

applicable to the press – i.e., that only speech that posed an imminent danger of actual taint could be restricted. 501 U.S. at 1065. The Supreme Court disagreed, concluding that, with respect to attorneys, the lesser "substantial likelihood of material prejudice" standard passed constitutional muster:

> The "substantial likelihood" test . . . is constitutional . . . for it is designed to protect the integrity and fairness of a state's judicial system, and it imposes only narrow and necessary limitations on lawyers' speech. The limitations are aimed at two principal evils: (1) comments that are likely to influence the actual outcome of trial, and (2) comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found.

Id at 1075. Subsequent discussions have held that Gentile's distinction between the press and attorneys applies with equal force to parties. For example, in United States v Brown, 218 F3d 415 (CA 5, 2000), the court considered and rejected the argument that, even if an attorney's speech can be constitutionally restrained because of ethics rules like the one at issue in Gentile, a party's speech cannot:

> In this case, the driving interest of the district court was to preserve the fair trial interests of the parties in all three related cases. As the district court pointed out, trial participants, like attorneys, "are privy to a wealth of information that, if disclosed to the public, could readily jeopardize the fair trial rights of all parties." The mischief that might have been visited upon the three related trials -- primarily jury tainting -- would have been the same whether prejudicial comments had been uttered by the parties or their lawyers. In other words, the problem the district court sought to avoid depended in no way on the identity of the speaker as either a lawyer or a party: the interests of the lawyers and the parties in "trying the case in the media" were (and continue to be) the same.

218 F3d at 428.

Gentile's clear rejection of the "actual taint" standard highlights the fallacy of the

Court of Appeals judicially legislated standard in the instant case under the purported aegis of Gentile. What is more, the misconduct in this case manifestly satisfied the standard articulated in Gentile: "Extrajudicial comments on, or discussion of, evidence which might never be admitted at trial . . . threaten to undermine th[e] basic tenet" that cases are to be "decided by impartial jurors, who know as little as possible of the case, based on material admitted into evidence before them in a court proceeding." 501 US at 1070. See also Sheppard v Maxwell, 384 US 333, 360-361; 86 S Ct 1507; 16 L Ed2d 600 (1966) (exclusion of inadmissible evidence "is rendered meaningless" when counsel gives it to the news media for public dissemination).

The comment to Michigan Rule of Professional Conduct 3.6, cited by the trial court in warning Plaintiff and her counsel, identifies as prohibited activity the very form of public dissemination in which they engaged: "information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial." MRPC 3.6, Comment (a)(5).[14] Plaintiff and her counsel knew that the evidence was inadmissible, because two trial judges had been adamant in ruling it inadmissible. Moreover, Plaintiff and her counsel knew that the excluded material was so incendiary and prejudicial that its admission would deny Defendants any hope of a fair trial. In fact, Plaintiff and her counsel knew Judge Giovan had been prodigious in his own efforts to protect against the release of the inadmissible evidence to the media, having excluded the press

[14] Another provision of the same comment reinforces the substantial prejudice arising from Mr. Bennett's inadmissible conviction. That provision includes in those statements "likely to have a prejudicial effect" are those relating to "the character, credibility, reputation or criminal record of a party . . . or of a witness." MCPR 3.6, Comment (a)(1) (emphasis added).

(despite invitations from Plaintiff and her counsel) from every hearing where inadmissible or potentially inadmissible evidence was to be addressed.[15]

Accordingly, the trial court found Plaintiff and her counsel engaged in misconduct that more than satisfied the standard of "substantial likelihood of material prejudice." There was and is no purpose in remanding the case, as the Court of Appeals' majority directed, for a "full evidentiary hearing to determine whether the 'substantial likelihood' test in Gentile" was satisfied.

d. An "Actual Taint" Proof Requirement Would Be Improper And Unworkable.

The Court of Appeals' requirement that there be proof of "actual taint," as shown through a "full evidentiary hearing" sets up an impossible standard. It would destroy the efficacy of a trial court's inherent authority to sanction, and it would defeat the objective of deterring litigant misconduct.

Furthermore, how can we determine whether the misconduct of Plaintiff and her counsel leading up to the anticipated July 2002 trial "actually tainted" the July 2002 jury venire? Can we assume that the memory of events two years after-the-fact will be as clear and reliable as a potential juror's state of mind at the time he or she was experiencing the media bombardment instigated by Plaintiff and her counsel? That assumption is contrary to human nature, as memories generally fade and do not

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[15] In the trial court and Court of Appeals, Plaintiff argued that, even through she and her counsel knew the evidence was inadmissible, the conduct fell within the "public record" safe harbor set forth in MCPR 3.6, Comment (b)(2). However, Michigan law defines "public record" to exclude judicial filings, MCL 15.232(d)(v), (e); MSA 4.1801(2)(d)(v),(e), and there was no public record of Mr. Bennett's conviction after it was expunged in November 2001. Because Plaintiff's and her counsel's conduct could not conceivably fall within this safe harbor, their argument is spurious.

sharpen with the passage of time. Judge White, writing separately, realized the futility of applying an "actual taint" standard so long after the misconduct occurred. (Appendix, Tab A, White, J., p. 1).

But the "actual taint" standard is flawed for another and broader reason. The standard in no way serves the goal of the inherent authority doctrine because it provides no deterrent to misconduct. Deterrence -- both in the case at hand and in future cases -- is a primary purpose for the exercise of the court's inherent authority to protect the integrity of the court and the judicial process generally. Requiring proof of the "actual taint" would only encourage the type of egregious misconduct present in this case, because litigants could repeatedly and flagrantly violate a trial court's *in limine* orders with the premeditated intent to tamper with the administration of justice, and gamble that success could not be affirmatively proven. Plaintiff and her counsel here actually dared the trial court to prove that they succeeded. How many potential jurors would have to be examined to prove "actual taint"? Would a greater, less, or equal number disprove "actual taint"? Such an effort would not only be foreign and unworkable – it would be unseemly and destructive.

Nor is jury *voir dire* an appropriate sanction for misconduct of this character. *Voir dire* is not a sanction at all, much less a sanction for the premeditated misconduct of Plaintiff and her counsel. And it is not a deterrent for future wrongdoing. It is also an added cost to litigants already victimized by their opponent's misconduct and an added burden on the trial court – a potentially huge and unpleasant burden. As the United States Supreme Court has observed, "Even if a fair trial can ultimately be ensured through *voir dire*, change of venue, or some other device, these measures entail serious

costs to the system." Gentile, supra, 501 U.S. at 1075.

3. The Trial Court Fully Considered Whether Less Drastic Sanctions Were Available And Appropriate.

The Court of Appeals criticized the trial court for not considering whether "other less drastic remedies were available to ensure that defendants received a fair trial." (Appendix, Tab A, p. 6). This is wrong for at least three reasons.

First, as discussed above, the Court of Appeals completely misconceived the purpose of a sanction under the inherent authority doctrine -- to punish egregious and premeditated misconduct and deter its repetition.

Second, the trial court restrained itself from premature dismissal of the case by giving two warnings that Plaintiff and her counsel were engaging in misconduct that needed to stop. In giving the second warning, the trial court explicitly said that Plaintiff's case would be dismissed if the misconduct did not cease immediately.

Third, following its two-day evidentiary hearing, the trial court expressly found that lesser sanctions would not deter Plaintiff's and her counsel's premeditated misconduct. The Court of Appeals' two opinions both suggest that the three appellate judges forgot that the trial court had conducted an extensive hearing and had rendered a detailed opinion.

It is inexplicable that the appellate judges would attack the trial judge for so many omissions that were not omissions at all. The only thing the trial judge omitted was a finding of "actual taint" – which would be virtually impossible to prove and is manifestly not required under the inherent authority doctrine.

It bears repeating that, at the close of a detailed opinion, the trial judge

concluded that dismissal was the appropriate sanction and that proof of "actual taint" of the jury pool was not required, in order to "preserve[e] the integrity of a court system" because:

> The behavior in question has been intentional, premeditated, and intransigent. It was designed to reach the farthest boundaries of the public consciousness. It should be presumed to have had its intended effect. (Appendix, Tab B, p. 12)

The Court of Appeals' statement that the trial court failed in any respect in applying the inherent authority doctrine betrays a misunderstanding of both the doctrine itself and the misconduct and proceedings that transpired in the court below.

The question before the Court of Appeals was not whether the appellate judges, had one of them been the trial judge, would have dismissed the case. Williams v Kroger Food Company, 46 Mich App 514, 517; 208 NW2d 549 (1973). The question before the Court of Appeals was whether the "decision to dismiss the action was the result of unrestrained discretion or imprudence." Cummings v Wayne County, supra, 210 Mich App at 253. There was no "unrestrained discretion or imprudence" on this record. To the contrary, the Court of Appeals understandably praised the trial court for "treat[ing] this case and the litigants with respect and a great deal of tolerance." (Appendix, Tab A, p. 10).

Judge Giovan properly applied the inherent authority doctrine in dismissing Plaintiff's lawsuit. It was clear error for the Court of Appeals to reverse that dismissal – an error predicated on a misunderstanding of the inherent authority doctrine, a misreading of legal precedents, and an apparent misperception of what transpired below. This Court should grant leave to appeal and either address on the merits these

important issues concerning the inherent authority doctrine, or peremptorily reverse and reinstate the trial court's dismissal order.

B. The Court Of Appeals' Treatment of Employer "Notice" Of An Alleged Sexually Hostile Work Environment To Include Unwitnessed, Unreported And Unknown Allegations Of Third Parties Is Of Major Significance To Michigan Employment Law.

The central error in the Court of Appeals' analysis is the notion that Plaintiff can rely on testimony from other women – unrelated third parties – who also claim to have been sexually harassed at some point by Mr. Bennett. These other complaints all entailed "he said, she said" allegations to which there were no witnesses, so the alleged harassment itself did not constitute notice to Ford. Ford did not learn of these harassment allegations until after Plaintiff claims to have been harassed by Mr. Bennett.[16] So how can this proffered third-party testimony establish that Ford had "notice" that Plaintiff was being subjected to a sexually harassing environment by Mr. Bennett? Both as a matter of basic logic and established case law, it cannot.

Recognizing that harassment allegations of others that were admittedly unknown to Ford prior to or during Plaintiff's alleged hostile work environment could not provide "notice" to Ford concerning Plaintiff's own work environment, the trial court gave this subject the scant attention it deserved. But, on appeal, the Court of Appeals held that all of this proffered third-party testimony, which Plaintiff admittedly wanted for "propensity" purposes in violation of MRE 404, could be introduced at trial to establish

[16] Plaintiff claimed that Mr. Bennett exposed himself to her on two occasions in or about February 1998 on the premises of the Wixom Plant and grabbed her breasts after work and off Ford premises in or about June, 1998. Plaintiff also alleged that in approximately March 1999 through June 1999, Mr. Bennett made sexually inappropriate gestures when passing her in the plant. (R. 307; Appendix, Tab O). Ford did not learn of

that Ford had "notice" of Plaintiff's hostile work environment under a "totality of the circumstances" test.[17] This gross – and wholly illogical – expansion of the "notice" concept is wrong as a matter of evidentiary theory, eliminates the Legislature's requirement of employer "fault" as the foundation for liability under the Elliott-Larsen Civil Rights Act, and is of major significance to the State's jurisprudence.

1. The Court of Appeals' Reasoning Defies Logic And Improperly Shifts the Burden To The Employer To Disprove Fault.

Under Michigan law, Plaintiff had to prove each of the following elements to maintain her sexually hostile work environment case against Ford:

(1) [she] belonged to a protected group;
(2) [she] was subjected to communication or conduct on the basis of sex;
(3) [she] was subjected to unwelcome sexual conduct or communication;
(4) the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with [her] employment or created an intimidating, hostile or offensive work environment; and
(5) *respondeat superior*.

Chambers v Trettco Inc, 463 Mich 297, 311; 614 NW2d 910 (2000) (quoting Radtke v Everett, 442 Mich 368, 382-383; 501 NW2d 155 (1993)). To establish the fifth element, *respondeat superior*, Plaintiff had the burden to establish "fault" on Ford's part by proving (1) she provided Ford with "reasonable notice," and (2) despite this reasonable notice, Ford failed to take prompt remedial action. Chambers, supra, 463 Mich at 312-313.

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[17] Most of the "propensity" testimony surfaced as a result of Plaintiff's attempts to recruit other hourly employees to make up stories about Mr. Bennett and become part of her $50 million "class action." Plaintiff admitted to the trial court that her primary reason for introducing the testimony was to prove Mr. Bennett's "propensity" to engage in sexual misconduct, and to show that he acted with her in conformity with his "propensity." (06/21/02 Tr., pp. 36-43; Appendix, Tab R). The trial court rejected this reasoning under MRE 404, and the Court of Appeals did not address the MRE 404 argument.

With respect to this "notice" requirement, Plaintiff had to prove either (1) actual notice; or (2) constructive notice. Sheridan v Forest Hills Public Schools, 247 Mich App 611, 621; 637 NW2d 536 (2001). To show actual notice, Plaintiff had to "'show that she complained to higher management of the harassment.'" Id (quoting McCarthy v State Farm Ins Co, 170 Mich App 451, 457; 428 NW2d 692 (1988)) (emphasis added). To demonstrate constructive notice, Plaintiff had to demonstrate the harassment was so pervasive that employer knowledge of plaintiff's sexually hostile work environment should be inferred. Id. See also Elezovic v Ford, 259 Mich App at 193 ("an employer is not liable for a claim of sexual harassment if it does not have actual or constructive notice).

In Chambers, this Court addressed the constructive notice concept. There, the Court relied on a federal case, Perry v Harris Chernin Inc, 126 F3d 1010 (CA 7, 1997), that addressed the notice requirement with specificity. Chambers, 463 Mich at 319. In Perry, the court held that the plaintiff did not provide either actual or constructive notice because she did not report the conduct despite the availability of a complaint procedure, and because no one else witnessed the alleged perpetrator engaging in sexually harassing conduct toward the plaintiff. Perry, 126 F3d at 1014. As the Perry court held, to find the employer liable where the plaintiff did not report the conduct and no one else witnessed it, would equate with the imposition of strict liability. Id.

The constructive notice concept is becoming a repeated – and often misused – theme in hostile environment cases. Because Chambers emphasizes the plaintiff's obligation to give notice as an affirmative element of her case, constructive notice (i.e., what the employer "should have known") is becoming a recurring issue in sexual

harassment litigation; it is the talisman that plaintiffs invoke in an effort to avoid the consequences of not giving actual notice. [18]

In a "fault" state such as Michigan, imputed knowledge, like imputed fault, has no place or significance. Instead, actual notice is required either through an adequate affirmative report or through conduct that is so egregious, concentrated, and frequent that a reasonable jury could conclude that the employer must have known that the plaintiff was being subjected to a campaign of harassment. See Adler v WalMart Stores, 144 F3d 664, 675 (CA 10, 1988). This is significantly different from the "should have known" constructive notice standard used here by the Court of Appeals.

In the instant case, the Court of Appeals plainly exceeded the scope of constructive notice contemplated by this Court in Chambers. In holding that "evidence of the other acts of harassment is highly probative about whether defendant Ford should have known that Bennett was sexually harassing plaintiff," the Court of Appeals' ruling seemingly contemplated that these claims should be admitted as some kind of "constructive notice" that Plaintiff was being subjected to a hostile work environment in February 1998 through June 1999. (Appendix, Tab A, p. 9). But there are obvious flaws in the Court of Appeals' reasoning. First, because none of the third-party

[18] In lieu of cooperating with Ford's internal reporting and investigatory procedure Plaintiff elected, in October 1998, to confide in her uncle (a first level manager at the Wixom Plant and Mr. Bennett's peer) and a friend (a former supervisor at the Wixom Plant) concerning Mr. Bennett. When asked why she chose this avenue rather than simply using Ford's established and publicized reporting process, she responded that she was not yet ready to file a formal complaint. In December 1999, while in Labor Relations to check on her holiday pay, Plaintiff made an offhanded reference concerning Mr. Bennett allegedly engaging in sexual misconduct, but, even then, Plaintiff declined to provide a statement or otherwise cooperate in an investigation. So actual notice is clearly a hurdle for Plaintiff.

incidents at issue were witnessed by anyone else, and since Mr. Bennett denied each allegation, Ford was at best confronted with an inconclusive "he said, she said" situation which does not establish, as Plaintiff contends, that Ford "knew" Bennett had been sexually harassing other female employees.[19] Second, the allegations of the other women about their problems with Mr. Bennett do not establish any knowledge by Ford about the sexual harassment Plaintiff claims she was experiencing – a factual predicate essential to Plaintiff's "notice" burden. And, third, even if the complaints by other women were to be believed and could be construed as notice about Plaintiff's situation as well, Ford could not have acted to prevent alleged harm to Plaintiff because these other complaints were not reported until after the alleged incidents between Plaintiff and Mr. Bennett – i.e., the timing is backwards.

This Court should grant leave to appeal and hold that a plaintiff who has not used the employer's reporting policy cannot plug the hole in her case by claiming that the employer "should have known" that the alleged perpetrator would some day pose a threat to plaintiff herself -- as well as all women in the workplace -- simply because of other complaints about him. To hold otherwise is tantamount to imposing strict liability on the employer for a sexually harassing work environment, an approach this Court rejected in Chambers because it would eliminate the Legislature's requirement of "fault" as the foundation for employer liability under the Elliott-Larsen Act. 463 Mich 297. Such an appraisal impermissibly shifts the burden to the employer to assume accused

[19] The only corroborating evidence for any of the Bennett allegations is the "propensity" testimony of the other women. Plaintiff has consistently argued that Ford should have believed the women rather than Mr. Bennett simply because a number of complaints were made against him in the years following his 1995 misdemeanor conviction.

perpetrators pose a future threat to all female employees, to take affirmative acts to prevent harassment before it has occurred, and to discover harassment that employees have elected not to report – a burden that is wholly inconsistent with this Court's holding in Chambers. An employer with an effective, designated channel for receiving complaints (as Ford has) is entitled to rely on employees to bring their complaints to its attention. See, e.g., Parkins v Civil Constructors of Illinois, 163 F3d 1027, 1035 (CA 7, 1998); Curry v District of Columbia, 195 F3d 654, 660 (CA DC, 1999). Easy resort to an alternative "what the employer should have known" analysis renders the complaint process nugatory.

2. Allegations Of Unwitnessed And Unreported Sexual Conduct Toward Others Had No Relevancy To Plaintiff's Environment.

While the Court of Appeals specifically held that the "propensity" witnesses testimony was admissible only on the issue of notice, the opinion's imprecise language and its casual reference to Jackson v Quanex Corp, 191 F3d 647 (CA 6, 1999), require attention and correction.

The Court of Appeals, citing Jackson, held that testimony of the other women "was clearly relevant to plaintiff's sexual harassment claim because plaintiff must show that Ford had notice of Bennett's sexual harassment under the 'totality of the circumstances' known to Ford." (Appendix, Tab A, p. 9). Plaintiff herself argued to the Court of Appeals that the "propensity" witnesses must be allowed to testify because they were part of the "totality of the circumstances" that was Plaintiff's work environment.

Plaintiff misrepresented the scope of Jackson, which has not been followed by

any other jurisdiction, at least until the Court of Appeals' opinion here. Jackson involved an alleged notoriously racially hostile work environment in a relatively small workplace (350 employees in a single building) purportedly generated by what the employer's own personnel director described as "organized groups of dangerous 'rednecks' in the plant who did not like African-Americans." 191 F3d at 653. Because several co-workers had contemporaneously shared their similar experiences with Ms. Jackson, the court held these shared incidents could be part of the plaintiff's work environment. Id at 661.

In contrast, Plaintiff's "propensity" witnesses would not testify about Plaintiff's work environment or shared experiences. They would testify about their own dealings with Mr. Bennett that were unknown to Plaintiff. The Wixom Plant, with some 3,500 employees, is so enormous that it is frequently referred to as "the city within a city." To be part of Plaintiff's work environment, even under Jackson, Plaintiff had to at least have had contemporaneous knowledge of these "propensity" witnesses' allegations concerning Mr. Bennett. See Beyda v City of Los Angeles, 65 Cal App 4th511; 76 Cal Rptr2d 547 (1998) (affirming *in limine* order excluding testimony of "propensity" witnesses where the plaintiff did not know of other claims at the time but learned of them later) (Appendix, Tab S). See also Abeita v Transamerica Mailings Inc, 159 F3d 246, 249 n4 (CA 6, 1998) ("me too" evidence that plaintiff did not know of at the time is not relevant to whether she experienced a hostile work environment). Accord, Burnett v Tyco Corp, 203 F3d 980, 981 (CA 6, 2000).

Plaintiff did not have contemporaneous knowledge of the "propensity" witnesses' work environment or experiences. Plaintiff's own testimony was that the sexually hostile work environment she attributed to Mr. Bennett ended as of June 1999. After that point,

she either was on leave of absence or working in a completely different part of the Wixom Plant. (R. 307, Exh. E). The only one of the many allegations that could conceivably be considered part of Plaintiff's work environment was Ms. Elezovic's allegation, which Plaintiff claimed she and Ms. Elezovic discussed in approximately June 1999.[20] All of the others Plaintiff learned of at a much later time, after and as a result of filing her lawsuit.

3. Admission Of The "Propensity" Testimony Would Unduly Prejudice Ford And Confuse The Jury.

Even if the "propensity" testimony were to have some marginal relevance, its value is substantially outweighed by the danger of unfair prejudice to Ford. MRE 403. See also, Franzel v Kerr Mfg Co, 234 Mich App 600, 618; 600 NW2d 66 (1999) ("even relevant evidence may be excluded . . . where a tendency exists that the evidence will be given undue or preemptive weight by the jury").

Evidence concerning sexual advances directed at others is titillating, sensational, and, if proven, illegal. The suggestion that Mr. Bennett engaged in an illegal act could only serve to inflame the jury and cause the jury to want to "punish" Ford for such perceived illegality. For example, in Bhaya v Westinghouse Elec Corp, 922 F2d 184 (CA 3, 1990); cert den, 501 US 1217; 111 S Ct 2827; 115 L Ed2d 997 (1991), the Third Circuit held that the trial judge's admission of evidence that suggested the plaintiff's

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[20] Ms. Elezovic's accusation already has been tried and found wanting. Because the trial court here excluded Ms. Elezovic's testimony as "propensity" or "other acts" evidence that violated MRE 404, this evidence should remain inadmissible for the additional reason that it failed the "evidentiary safeguard" requirement for propensity evidence. As this Court held with respect to such evidence, it should be excluded unless there is "substantial proof that the defendant committed the other act sought to be introduced." People v Engleman, 434 Mich 204, 213; 453 NW2d 656 (1990).

management had engaged in illegal conduct not directly tied to the action the plaintiff challenged as discriminatory required a new trial. As the court explained, "the jury probably was left with the impression that [Westinghouse's] managers were a lawless bunch." Id at 187-188. Accordingly, courts often exclude the very type of "me too" evidence that is so integral to Plaintiff's trial strategy here. See, e.g., McCue v State of Kansas Dept of Human Resources, 165 F3d 784, 790 (CA 10, 1999) (error to admit character evidence that the plaintiff's supervisor may have discriminated against other employees); Coleman v Quaker Oats Co, 232 F3d 1271, 1296 (CA 9, 2000) (parade of witnesses, each testifying to their own personal age discrimination claims, would unduly prejudice employer), cert den, 533 US 950; 121 S Ct 2592; 150 L Ed2d 751 (2001); Schrand v Federal Pacific Elec Co, 851 F2d 152, 156-57 (CA 6, 1988) (reversible error to admit "me too" evidence); Annis v County of Westchester, 136 F3d 239 (CA 2, 1998) (trial court erred in denying the defendants' motions *in limine* to exclude testimony by plaintiff's fellow employee of various "sordid acts" finding that such evidence was "fiercely prejudicial," only "minimally probative," and would tend to confuse the jury, who would "naturally associate these conditions with [the individual defendant] even in the absence of similar goings on during his tenure").

Plaintiff understandably wants the jury to be incensed by the untested and unproven allegations made by Ms. Perez and the other third-party witnesses, and on that basis to find in Plaintiff's favor. The sheer number of allegations, regardless of their truth or falsity, is likely to incite the jury and lead the jury to conclude Mr. Bennett must have done something wrong to someone. Because such piggybacking could only encourage the jury to render an improper verdict, the trial court did not abuse its

discretion in ordering the testimony excluded *in limine*. All that could transpire as a result of testimony by these third-party witnesses is a series of mini-trials, in which the others' claims are presented and rebutted, lest Ford be precluded from adequately defending itself against Plaintiff's allegations, and those of the others as well.[21]

Third-party testimony of the type proffered by Plaintiff could only lead jurors to conclude that, if they believed any of the "propensity" witnesses, then they should also believe Plaintiff. Schrand, 851 F2d at 156-57. Clearly, the trial court did not abuse its discretion because the testimony, even if arguably admissible under MRE 404(b), should be excluded under MRE 403.

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[21] Ms. Elezovic's claim provides a good example of exactly what type of mini-trials would have to be conducted within the framework of Plaintiff's trial. As Ms. Elezovic's own trial proved, hers is not the type of claim that Ford can defend against simply by cross-examining her on the stand. Her testimony, in brief, was that Mr. Bennett exposed himself to her in the summer of 1995 in a remote area of the plant, and she did not tell anyone (except her therapist) until 1999 because she could never complain about sexual harassment because of her Albanian culture and the shame it would bring to her family. In reality, Ms. Elezovic's problem with Mr. Bennett was his refusal to continue preferential shift treatment that she had, in the past, been able to obtain from others. Ms. Elezovic had not hesitated to contemporaneously complain about Mr. Bennett and the shift issue; in fact when Ms. Elezovic had run into a similar shift issue in the past with her committeeman, Bill McKeever, Ms. Elezovic had done exactly what she did in Mr. Bennett's case -- she filed grievances and made multiple trips to labor relations. When that did not get her what she wanted, she complained -- in writing -- that Mr. McKeever was sexually harassing her. Ms. Elezovic flatly denied all of this on the stand, accusing Ford of falsifying documents to make it look like she complained about Mr. McKeever's alleged sexual harassment. It therefore not only took the testimony of Wixom labor relations representatives, but also the retention of a handwriting expert before Ms. Elezovic admitted she had been untruthful in her testimony. It also took retention of an ink-dating expert to get an admission from Ms. Elezovic's therapist that the therapist had materially altered her notes to make it appear that Ms. Elezovic's initial complaint to her was about sexual harassment by Mr. Bennett, rather than just the preferential shift issue. This is just an illustration of the type of proof Ford needed to defend against what, untested for its truth, superficially seemed to be a reasonably believable presentation. It is exactly the type of evidence that will be needed in each of these strictly "he said, she said" situations, if Ford is to be afforded its right to defend itself.

IV. RELIEF REQUESTED

Defendant-Appellee Ford Motor Company respectfully requests that this Court grant leave on Ford's behalf to appeal the rulings of the Court of Appeals that reversed the trial court's dismissal of Plaintiff's complaint as well as the trial court's *in limine* order precluding the testimony of Plaintiff's "propensity" witnesses.

Respectfully submitted,

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